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Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Submitted via email: rule-comments@sec.gov

Re: Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections and Associated Fees (Exchange Act Release No. 34-88901; File Nos. SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEArca-2020-08, SR-NYSECHX-2020-02, SR-NYSENAT-2020-03, SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, SR-NYSENAT2020-08)

Dear Ms. Countryman:

Bloomberg L.P.[1] respectfully submits this letter in response to the above-referenced order instituting proceedings ("OIP") to determine whether to approve or disapprove of the proposed rule changes submitted by the New York Stock Exchange and its exchange affiliates (collectively referred to as "NYSE" or the "Exchanges") to establish fees for a new set of wireless connections ("Wireless Connections").

Under the proposals (collectively, the Wireless I and Wireless II proposals),[2] the Wireless Connections would facilitate the transmission of data, including NYSE market data, through a

[1] Bloomberg – the global business, financial information, and news leader – increases access to market data by connecting market participants of all stripes to a dynamic network of information, people, and ideas. The company's strength – quickly and accurately delivering data, news, and analytics through innovative technology – is at the core of the Bloomberg Terminal. The Terminal provides financial market information, data, news, and analytics to banks, broker-dealers, institutional investors, governmental bodies, and other business and financial professionals worldwide.

[2] Securities Exchange Act Release Nos. 88168 (February 11, 2020), 85 FR 8938 (February 18, 2020) (SR-NYSE-2020-05), *available at* https://www.sec.gov/rules/sro/nyse/2020/34-88168.pdf (Wireless I Proposal); 88169 (February 11, 2020), 85 FR 8946 (February 18, 2020) (SR-NYSEAMER-2020-05); 88170 (February 11, 2020), 85 FR 8956 (February 18, 2020) (SR-NYSEArca-2020-08); 88172 (February 11, 2020), 85 FR 8923 (February 18, 2020) (SR-NYSECHX-2020-02); and 88171 (February 11, 2020), 85 FR 8930 (February 18, 2020) (SR-NYSENAT-2020-03) (collectively, the "Wireless I proposals"). Securities Exchange Act Release Nos. 88237 (February 19, 2020), 85 FR 10752 (February 25, 2020) (SR-NYSE-2020-11); 88238 (February 19, 2020), 85 FR 10776 (February 25, 2020) (SR-NYSEAMER-2020-10); 88239 (February 19, 2020), 85 FR 10786 (February 25, 2020) (SR-NYSEArca-2020-15); 88240 (February 19, 2020), 85 FR 10795 (February 25, 2020) (SR-NYSECHX-2020-05); and 88241 (February 19, 2020), 85 FR 10738 (February 25, 2020) (SR-NYSENAT-2020-08) (collectively, the "Wireless II proposals").

series of towers equipped with wireless equipment, including one tower that is located on NYSE data center property. [3] According to the proposals, the Wireless Connections would be operated by ICE Data Services ("IDS"), an affiliate of ICE, which operates a global connectivity network.[4] Only IDS will be permitted to access the roof and the tower on the NYSE data center property to operate the wireless equipment, and IDS will not sell rights to third parties to operate wireless equipment.[5] In sum, NYSE is proposing to create a new high speed network that would have exclusive access to the NYSE data center property.

As we noted in our prior letter,

> The Proposal is extremely concerning for a number of reasons. Most importantly, NYSE is contending that the proposed services are not "facilities" of the exchange within the long-settled meaning of the Exchange Act of 1934, and therefore these services do not need to be included in the Exchanges' rules, or comply with the requirements of the Exchange Act.[6]

We continue to fully support the staff in its position that the Wireless Connections are facilities of the Exchange. The Wireless Connections fall squarely within the definition of facilities under the Exchange Act of 1934. The definition of a facility of an exchange is quite broad and includes the premises, tangible or intangible property whether on the premises or not, and any right to use such premises or property or any service thereof, including any system of communication to or from the exchange. The Wireless Connections are physically located on the property of the data center. Under any interpretation of the word "premises," including NYSE's, the Wireless Connections would fall within this term. Likewise "services" are expressly covered.

In addition to the radical interpretation that the Wireless Connections do not constitute facilities of the exchange, we noted several other important concerns raised by the proposals:

- If NYSE is successful in contending that the Wireless Connections are not facilities of the exchange, none of the regulations and customer protections of the Exchange Act would apply to NYSE in providing these basic exchange services.

- The Securities and Exchange Commission would have no ability to oversee these services, and the comprehensive regulatory framework, that has been put in place by Congress and has served the market well since 1934, would be completely circumvented.

- The specialized access and placement of the antenna means that no one else can offer the same service. The location of the equipment on the data center roof would provide the lowest latency connections to the data center. "Competing" providers would not have

[3] Wireless I Proposal at 18.
[4] Wireless I Proposal at 4.
[5] Wireless I Proposal at 26.
[6] Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P. to Vanessa Countryman, Secretary, Commission, dated March 10, 2020, *available at* https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-6934385-211627.pdf ("Bloomberg Letter").

access to the roof under NYSE's Proposal, which would create a structural impediment to competition.

- The Exchanges have not demonstrated that the proposed fees are consistent with the requirements of the Exchange Act. Under the Exchange Act, the fees for Wireless Connections: (i) should "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;"[7] (ii) should not be "designed to permit unfair discrimination between customers, issuers, brokers or dealers;"[8] and (iii) should "not impose any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act.[9] NYSE is proposing to charge market participants an initial fee of $10,000 per connection and recurring monthly fees of up to $45,000 per month per connection for these Wireless Connections depending upon bandwidth and type of service.[10] NYSE has not justified these proposed fees or provided information that would allow the Commission to determine their consistency with the Exchange Act, Commission Rules, and associated guidance.

- In 2017, NYSE led an unsuccessful effort to secure Congressional passage of H.R. 3555, the "Exchange Regulatory Improvement Act."[11] The alleged "improvement" envisioned by this proposed legislation would have been to dramatically change the foundational definition of a "facility" of an exchange under the Exchange Act in order to limit the SEC's authority in this space. At the time the legislation was introduced, market participants and commenters noted that the language would limit the SEC's oversight of the exchanges with potentially negative consequences for the cost and availability of market data, reducing enforcement tools, and depriving the Commission of jurisdiction over order types, among other potential negative consequences. [12] The NYSE proposals seem predicated on the erroneous idea that H.R. 3555 was actually enacted. The proposed legislation was, of course, not enacted – and under long-standing and still existing law the proposed services at issue here are most certainly "facilities" of the exchange under the Exchange Act of 1934.

In response to the Wireless I and Wireless II proposals, the Commission received a number of comment letters from a broad array of market participants urging the Commission to, in the first instance, treat the Wireless Connections as a facility of an exchange, and second, to reject the Wireless I and Wireless II proposals on the grounds that the Exchanges have not met their burden of demonstrating that the proposed connections and associated fees are consistent with the Exchange Act and Commission Rules.

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[7] Exchange Act § 6(b)(4).
[8] Exchange Act § 6(b)(5).
[9] Exchange Act § 6(b)(8).
[10] Wireless I Proposal at 14-15.
[11] *Exchange Regulatory Improvement Act* (H.R. 3555) 115th Cong. (2017).
[12] *See* Letter from David Oxner Managing Director, SIFMA, to Rep. Jeb Hensarling, Chairman, and Rep. Maxine Waters, Ranking Member, House Committee on Financial Services (July 10, 2018); *See also* Potential Ramifications of The Exchange Regulatory Improvement Act (November 14, 2017), available at https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2017-general-pdfs/hr-3555.pdf?la=en

We agree with these additional comments and believe that the Exchanges have not met their burden to allow for the approval of the Wireless Connections and associated fees. [13] As the Commission notes in the OIP, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change."[14]

To highlight an example of the deficiency of the proposals in demonstrating their consistency with the Exchange Act, NYSE concedes in its comment letter that "having a pole 700 feet closer to a facility is a positive factor for latency," but also notes that "it is just one in a list of factors that determine the network's latency levels."[15] The very basic information about the pole location was omitted from both the Wireless I and Wireless II proposals. The configuration came to light largely as a result of the diligent work and vigilant monitoring of the local zoning board by market participants. In its response, and although NYSE now acknowledges that the pole is closer, it defends itself by noting that this proximity advantage is only one factor for latency, and that "IDS does not believe that its wireless network offers the fastest commercial option."[16] NYSE fails to meaningfully evaluate whether the other factors lead to an overall arrangement that is consistent with the requirements of the Exchange Act, and more importantly, why NYSE should be able to reward its own affiliate with an advantage over this "one factor" – especially a factor as critical as uniquely low latency.

As we noted in our prior letter:

> Given the exclusivity of this service, it would be difficult for NYSE to demonstrate how these fees are fair and reasonable without providing an in depth assessment of the costs of the service. However, this analysis was not included in the Proposal. It would be even more difficult still for NYSE to justify how these fees are not unfairly discriminatory. NYSE is reserving for its own affiliate the exclusive right to operate Wireless Connections that are located on the data center property. Little to no attempt is made in the Proposal to discuss the implications of this exclusive privilege.

Since we submitted our last letter, our concerns regarding this Proposal have only increased.

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[13] 17 CFR 201.700(b)(3).
[14] OIP at 25.
[15] *See* Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel & Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, Commission, dated May 8, 2020, at 6, *available at* https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-7168807-216593.pdf.
[16] OIP at 23.

Conclusion

In recent years, the Commission has undertaken a number of serious and thoughtful reforms in the market data space.[17] This has spurred some exchanges to urge Congress to amend our foundational securities laws to eliminate SEC jurisdiction over many activities carried out through exchanges and their facilities. Congress has resisted doing so.

For all of the reasons set forth above, and for the reasons set forth in our prior comment letter, we urge the Commission to disapprove the Wireless I and Wireless II proposals. The Exchanges have not demonstrated that the proposals are consistent with the Exchange Act and Commission Rules. We appreciate the Commission's efforts and the Commission's consistent interpretation of the definition of "facility." We would be pleased to discuss any question that the Commission may have with respect to this letter. Thank you again for the Commission's efforts.

Very truly yours,

Gregory Babyak
Global Head of Regulatory Affairs, Bloomberg L.P.

[17] *See* Equity Market Structure Roundtable on Market Data and Market Access (October 26, 2018), *available at* https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-marketdata-market-access-102618-transcript.pdf; *In re SIFMA*, Exchange Act Release No. 84432 (October 16, 2018).